No. 48946-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSEPH GUENTHER, Appellant.

Appeal from the Superior Court of Jefferson County
The Honorable Keith C. Harper
No. 15-1-00195-2

BRIEF OF APPELLANT JOSEPH GUENTHER

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1. Does the State commit flagrant and ill-intentioned misconduct when it argues several facts, not in evidence, in its closing argument, when those facts strengthen the State's argument that the defendant intended to sell wood before he cut down a tree when intent to sell is the disputed issue at trial?

2. Does the State commit misconduct when it twice asks an officer to comment on a witnesses' veracity, where the credibility of the witness is at issue?
3. Is it ineffective and unreasonable for defense counsel to fail to object to the State's closing argument, which states facts not in evidence when those facts are harmful to the defense and there is no possible defense strategy for failing to object?
4. Does a trial court abuse its discretion in denying a motion for a mistrial, when the State twice asks an officer to comment on a witness's veracity, where the credibility of that witness is at issue? Is a curative instruction sufficient where the jury has already heard the State's questions and heard the officer's opinion that the witness who testified against the defendant was forthright?
5. Does a trial court abuse its discretion when it imposes legal financial obligations when a defendant is found to be indigent and without making a sufficient inquiry into his ability to pay?

III. STATEMENT OF THE CASE

1. Facts.

On December 21, 2015, Joseph Guenther and Peter Smith cut down a Maple tree. (RP 107). Mr. Smith testified that Mr. Guenther called him and asked him to help him cut down a tree for firewood. (RP 107). Mr. Smith testified that the tree "was a big ugly branchless dead looking maple." (RP 109). Mr. Smith testified the tree was likely dying. (RP 116).

After they had gone to cut down the tree, Mr. Guenther thought the wood might be more valuable and said something about selling the tree to someone who makes musical instruments, if the tree was figured. (RP 108-09). Figured wood has a wave pattern and is more valuable. (RP 109). Mr. Smith testified that it is one in a million chance of finding a valuable, figured, Maple, that is worth selling. (RP 106). Generally, it is not worth the time, effort, and cost of the chain for a saw to cut down and sell a maple. (RP 114).

Mr. Smith cut down the tree. (RP 110). According to Mr. Smith, the tree that he cut down wasn't worth any value. (RP 114). At that point, they were cutting it into firewood. (RP 115). Mr. Smith testified that it was in larger chunks than he would have normally done for firewood, but that they were cutting it for firewood. (RP 115).

Police contacted Mr. Guenther and Mr. Smith. (RP 123, 136). They did not have permission to cut down the tree. (RP 190). The tree was cut down and sectioned or blocked into smaller areas. (RP 121). According to the officers, the sections were over twenty-four inches, which was more consistent with trying to sell it for furniture or instruments, than firewood, which is typically cut into sixteen inch sections. (RP 122, 134). One officer also testified that there was some figuring in the stump of the tree. (RP 152).

Mr. Smith testified that Mr. Guenther told him he had permission and he was only helping Mr. Guenther, thereby implicating Mr. Guenther and exonerating himself. (RP 139). The prosecutor asked the officer to comment on Mr. Smith's veracity twice.

> Q. And did he appear forthright?
>
> A. He did.
>
> MR. ROBERTS: Objection. Vouching for the witness's credibility, Judge.
>
> THE COURT: Sustained. Um, the jury –
>
> MR. ROBERTS: Ask that the --
>
> THE COURT: -- the jury will ignore that last question and answer. Go ahead.

(RP 139). Immediately thereafter, the State asked:

> Q. Was there anything about Mr. Smith's behavior at that time that indicated deception?
>
> MR. ROBERTS: Objection, Judge. Can you excuse the jury, please?

(RP 139).

After the second question, Mr. Guenther requested a mistrial. (RP 141). The court denied the motion for a mistrial. (RP 144). Mr. Guenther then requested a curative instruction. (RP 144). The court told the jury:

> Prior to the jury going out there was an objection by Mr. Roberts for the defense that it was improper to, or, there was an objection by Mr. Roberts for the defense concerning questions of the officer relating to Mr. Smith's, whether, whether he was straightforward or forthright, or whether he appeared to be deceptive. Those questions were not proper questions to ask of this officer and, um, any response by the officer would not be proper. So, the objection is sustained and the jury will ignore, um, will ignore the testimony of the office pertaining to whether, whether or not Mr. Smith was straightforward, forthright, or deceptive, or not. And the answers are stricken from the record in that regard.

(RP 146).

After he was arrested, Mr. Guenther told the police that he was going to try to sell some of the wood to Faith Farms, a company that makes instruments. (RP 147). He said he was going to try to sell any figured wood, and use the rest for firewood. (RP 153).

Jason Cecil, a certified arborist, testified that the way the wood was sectioned was consistent with firewood doubles, meaning the wood was cut to approximately double the length of firewood, which is common

for transporting. (RP 180). He testified it was not cut consistent with using for instruments, the wood was not figured, and any possibly valuable sections had been cut through, which you would not do if you were trying to sell it for instruments. (RP 181-86).

2. Closing Arguments.

The State, in its closing arguments, argued that maple is good wood for guitars and that Mr. Guenther told Mr. Smith that he wanted to sell the wood to Faith Farms. (RP 229). The State also argued that Mr. Guenther told the officer that he was going to sell the stump and use the rest for firewood. (RP 231). None of these facts were in evidence.

3. Legal Financial Obligations.

Mr. Guenther was found guilty. (RP 252). He was sentenced to nine months in jail. (RP 265-66, CP 124). At sentencing, the court imposed $800 in "mandatory" fees ($500 crime victim penalty assessment (CVPA), $200 court costs, and $100 DNA) and an addition $600 in attorney's fees. (RP 266-67, CP 126). The only question the court asked Mr. Guenther about his ability to pay was, "The total would be about Fourteen Hundred Dollars. You're able to work, and would you be able to pay that off over the next three or four years?" (RP 267). Mr. Guenther replied, "Yes." (RP 267).

I. ARGUMENT

1. The State Committed Prosecutorial Misconduct by Arguing Facts Not in Evidence and Asking a Witness to Comment on Another Witness' Veracity.

A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005); *In re Glasmann*, 175 Wash.2d 696, 703-04, 286 P.3d 673, 677 (2012); *State v. Davenport,* 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). "However, if the alleged misconduct is found to directly violate a constitutional right . . . then 'it is subject to the stricter standard of constitutional harmless error.'" *State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (internal citations omitted).

a. *The State Argued Facts Not in Evidence.*

The State argued facts not in evidence during its closing argument. These arguments were not objected to.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant

and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

It is improper for the State to argue facts that are not in evidence. *State v. Jones*, 144 Wash. App. 284, 294, 183 P.3d 307, 313 (2008). In this case, the State argued that maple is good wood for guitars. There was testimony that maple can be used for instruments, but there was no testimony about guitars. The State argued that Mr. Guenther told Mr. Smith that he wanted to sell the wood to Faith Farms; no one testified that Mr. Guenther ever told Mr. Smith that he wanted to sell the wood to Faith Farms. The State also argued that Mr. Guenther told the officer that he was going to sell the stump (because it was figured) and use the rest for firewood; Mr. Guenther never testified that he wanted to sell the stump. The State's statements all were used to prove that Mr. Guenther planned to sell the wood before he cut it down.

Mr. Guenther was charged with one count of trafficking in stolen property in the first degree. A person is guilty of trafficking in stolen property in the first degree if he "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree." RCW 9A.82.050. Therefore, the

State had to prove that Mr. Guenther planned to sell the wood to others at the time he initiated, organized, planed, financed, directed, managed, or supervised the theft of the tree. On the other hand, if he planned to cut down and steal the tree to use it for firewood, and then later, after it was cut, considered selling it, he would not be guilty of trafficking in stolen property. Therefore, the State's argument, not supported by the record, was extremely prejudicial.

b. *The State Improperly Asked to the Officer to Comment on a Witness' Veracity.*

The State improperly asked the officer to comment on Mr. Smith's veracity. The officer responded that Mr. Smith, who testified against Mr. Guenther, was forthright. Mr. Guenther objected, the objection was sustained, and the jury was instructed to disregard the answer. Immediately therefore, the State again asked the officer whether or not Mr. Smith appeared deceptive. Again, the question was objected to and the objection was sustained.

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *In re Glasmann*, 175 Wash. 2d at 703-04, *citing Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch,* 137

Wash.2d 792, 843, 975 P.2d 967 (1999); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

Furthermore, the right to have factual questions decided by the jury is crucial to the right to trial by jury. WASH. CONST. art I, §§ 21, 22, U.S. CONST. amend. VII. "The role of the jury is to be held 'inviolate' under Washington's constitution." *State v. Montgomery*, 163 Wash. 2d 577, 590, 183 P.3d 267, 273 (2008). Opinion testimony is inappropriate when a witness is commenting on the veracity of a witness or the guilt of the accused. *Id.* at 591. Such impermissible opinion testimony may constitute reversible error because it violates the defendant's constitutional right to a jury trial, which includes independent determination of the facts by the jury. *State v. Kirkman*, 159 Wash. 2d 918, 927, 155 P.3d 125, 130 (2007).

Washington courts, as well as federal courts, have long recognized the inherent danger in admitting opinion testimony of law enforcement officers. *State v. Carlin*, 40 Wn. App. 698, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder); *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (statements of law enforcement officers often carry "an aura of special reliability and trustworthiness"), quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987); *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (police officer's testimony carries an "aura of reliability"); *State v. Barr*, 123 Wn. App.

373, 381, 98 P.3d 518 (2004) (law enforcement officer's opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial).

"Cross examination designed to compel a witness to express an opinion as to whether other witnesses were lying constitutes misconduct." *State v. Stith*, 71 Wash. App. 14, 18, 856 P.2d 415, 418 (1993), quoting *State v. Stover,* 67 Wash.App. 228, 230-31, 834 P.2d 671 (1992), *review denied,* 120 Wash.2d 1025, 847 P.2d 480 (1993).

Improper opinion testimony is reviewed under the constitutional harmless error standard. *Barr*, 123 Wash. App. at 373. Under the overwhelming evidence test, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. *Id.* at 383-84, citing *State v. Guloy*, 104 Wash.2d 412, 426, 705 P.2d 1182 (1985); *Carlin*, 40 Wash. App. at 703. Errors involving police officers are less likely to be harmless because police officers are likely to influence juries. *Id.* at 384.

In this case, the jury heard the officer's testimony that Mr. Smith was forthright. Whether or not Mr. Guenther planned to sell the wood before he decided to cut down the tree or after was critical to whether he was guilty of trafficking, or the lesser charge of theft. Therefore, the officer's testimony that Mr. Smith was forthright, likely affected the jury's

verdict.

2. Mr. Guenther Was Unfairly Prejudiced by Improper Statements Regarding Mr. Smith's Veracity and the Trial Court's Instructions to Disregard the Statements Were Insufficient to "Unring the Bell.;" Therefore, the Trial Court Erred by Refusing to Grant a Mistrial.

The State twice asked the officer to comment on Mr. Smith's veracity; and thereby, implicitly comment on Mr. Guenther's guilt. As discussed above, the State's questions to the officer, asking him to comment on Mr. Smith's veracity, were improper. Both statements were objected to, and both were ultimately sustained and the jury instructed to disregard the officer's statements. However, given the extremely prejudicial nature of the statements, the trial court's rulings were insufficient to "unring the bell."

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Hopson*, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). A mistrial should be granted when there is a "substantial likelihood" that the error will affect the jury verdict and when there is no other remedy. *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994); *State v. Crane*, 116 Wash.2d 315, 332-33, 804 P.2d 10 (1991); *State v. Mak*, 105 Wash.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

In this case, the court's curative instruction was insufficient to "unring the bell." In *State v. Miles*, 73 Wn.2d 67, 436 P.2d 198 (1968), a Spokane police officer was asked to relate a message that had been received from the Yakima County sheriff's office, which was the basis for the defendant's arrest. *Id.* at 68, 436 P.2d 198. Over defense counsel's objection that the answer would be hearsay, the court allowed the officer to answer, stating that the testimony was not offered to prove the truth of the matter contained therein. *Id.* The officer then testified that the message described two wanted subjects out of Yakima County and a wanted car, and stated that they were headed for Spokane to commit another robbery. *Id.* The trial court instructed the jury to disregard the testimony. *Id.* at 69.

The *Miles* court reversed, finding that the court's instruction was insufficient to remove the prejudicial effect of the officer's testimony. *Id.* at 70. "The question in all cases, is not whether the court, if trying the case, would disregard the obnoxious evidence but whether the court is assured that the jury has done so." S*tate v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965), quoting *State v. Meader*, 54 Vt. 126, 132 (1881). Because the testimony was so "inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors" (*Miles*, 73 Wn.2d at 71) it cannot be assumed that the jury could disregard the testimony.

In *Stith*, the court held that the prosecutor's improper closing argument, arguing that probable cause had previously been determined, that there are safeguards in place to prevent police from lying, and making reference to the defendant's prior drug dealing, all which were not in evidence and not proper, was so prejudicial, that the court's curative instruction was insufficient. *Stith*, 71 Wash. App. at 23. Therefore, the conviction was reversed. *Id.*

In this case, although the trial court sustained the objections and instructed the jury to disregard the testimony, the jury heard both of the questions and the officers answer that Mr. Smith appeared forthright. In this case, the jury may have believed that Mr. Smith, who cut down the tree, implicated Mr. Guenther to protect himself. And, in this case, the most significant issue was whether Mr. Guenther planned to sell the wood before, or after, he decided to cut the tree. Therefore, the officer's testimony that Mr. Smith was believable, was highly prejudicial. It was error to deny Mr. Guenther's request for a mistrial. The trial court's rulings were insufficient to "unring the bell," and thereby denied Mr. Guenther of his right to a fair trial by jury. Therefore, this court should reverse and remand for a new trial.

3. Mr. Guenther Received Ineffective Assistance of Counsel Because Counsel Failed to Object to the State's Improper Closing Arguments.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutherbv.* 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

As discussed above, the State improperly argued facts not in evidence. Defense counsel did not object. Failure to object to the State's improper argument was clearly unreasonable in this case. There was no possible legal strategy for failing to object and the argument prejudiced

Mr. Guenther. Therefore, the case should be reversed and remanded for a new trial.

4. The Trial Court Improperly Imposed Legal Financial Obligations Without Taking Into Consideration Mr. Guenther's Ability to Pay.

A trial court must inquire about a defendant's ability to pay before imposing legal financial obligations (LFOs).

> RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015).

> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Id. at 838-39.

In this case, the only question the court asked Mr. Guenther about his ability to pay was, "The total would be about Fourteen Hundred Dollars. You're able to work, and would you be able to pay that off over the next three or four years?" (RP 267). Mr. Guenther replied, "Yes." (RP 267). Then, the court imposed $800 in "mandatory" fees ($500 crime victim penalty assessment (CVPA), $200 court costs, and $100 DNA) and an addition $600 in attorney's fees. (RP 266-67, CP 126). Mr. Guenther was ordered to pay $50 per month, and if he fails to pay or appear at court, a warrant will be issued for his arrest. (CP 132).

At the time of sentencing, Mr. Guenther was unemployed, had no assets, owed other court costs and fines, and was receiving food stamps. (CP 142-45). He was found to be indigent, and counsel was appointed for this appeal. (CP 146-47). Counsel had also been appointed for his trial. (CP 6).

The trial court made an inadequate inquiry into Mr. Guenther's ability to pay. Given that Mr. Guenther was found indigent, the court abused its discretion by imposing $1,400 in legal financial obligations.

5. This Court Should Not Impose Appellate Costs Because Mr. Guenther is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[1], 14.1(c)[2].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

---

[1] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review*." RAP 14.2 (emphasis added).

[2] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

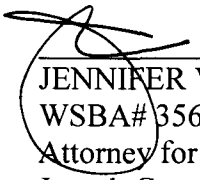
In this case, Mr. Guenther was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 6, 146-47). Mr. Guenther is unemployed, receives food stamps, has other legal debts, and no assets. (CP 142-45). Therefore, it is extremely unlikely that Mr. Guenther will be able to pay appellate costs after his release from jail. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Guenther does not substantially prevail.

CONCLUSION

In conclusion, Mr. Guenther was denied a fair trial due to prosecutorial misconduct and the officer's improper opinion testimony regarding a witness' veracity. Therefore, this case should be reversed and remanded for a new trial. In addition, the sentence should be reversed and remanded for resentencing because the court failed to properly consider Mr. Guenther's ability to pay legal financial obligations.

Dated this 13th day of October, 2016.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
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The undersigned certifies that on October 13th, 2016 correct copies of this appellant's brief were delivered electronically to the following:

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Mary E. Barlow

Signed October 14, 2016 at Tacoma, Washington.

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